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OGC Has Reviewed

16 June 1958

MEMORANDUM FOR: Project Comptroller, DPS/DCI

SUBJECT: Per Diem Claim

1. By a memorandum dated 29 May 1958, you have presented a question posed with you by IAC, whether [redacted], IAC employee who suffered a broken leg at [redacted] on 5 December 1957 and was hospitalized in [redacted] for the period 7 December 1957 to 11 March 1958, is entitled to receive per diem payments for the period of hospitalization. We think he is.

2. The contract between [redacted] and IAC provides in pertinent part at Section 8, "Vacation and Sick Leave":

"(b) Sick Leave: In the event of sickness, Employee shall be entitled to paid sick leave as determined by Employer and expressed in Employer's Industrial Relations Directives governing Salaried Employees. During periods of paid sick leave overseas, Employee shall be entitled to his regular pay and Per Diem. Both Basic Overseas Differential and Area Overseas Differential shall apply during such periods of paid sick leave. During periods of a full calendar week or more of paid sick leave within the Continental limits of the United States, no overseas differential will be paid, and after employee's return to Burbank, no per diem will be paid. In cases of extended sick leave of five or more consecutive days of illness, time off will cease to accrue with the last day prior to the start of the sick leave period, and shall not again begin to accrue until the sick leave period is over and the man is released for duty." (Underscored supplied.)

We do not believe that the clear expression regarding per diem entitlement during sick leave which is set forth in the underscored portion of this section is limited by Section 6, "Subsistence." It is there provided in part:

"At all times during the term of this Agreement, including such time taken as days off, Employer will pay or cause to be paid to Employee a Per Diem Allowance on the same basis as paid to Government civilian employees assigned to the same project and area. Employer will provide or cause to be provided Employee's food and housing at the same cost to Employee as Military Officer and Civilian personnel assigned to the same project and area. No per diem will be paid during any period of time spent as Vacation time wherever taken. No per diem will be paid during any period of sick leave taken after employee has been returned to Burbank."

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3. Reference has been made to the fact that the first sentence of Section 6 provides that the employer will pay a "Per Diem Allowance on the same basis as paid to Government civilian employees assigned to the same project and area." Insofar as this general expression of policy might be considered to limit the payment to a period such as the 14 days mentioned in your memorandum, we believe it is qualified with regard to per diem payments made during sick leave by the remainder of Section 6, in particular the last sentence: "No per diem will be paid during any period of sick leave taken after employee has been returned to Burbank", and by the underscored portion of Section 5, set forth above.

4. In accordance with the foregoing we would find that per diem and both basic overseas differential and area overseas differential are payable during any period of "paid sick leave" overseas, and, that per diem (but not the differentials) is payable during a period of "paid sick leave" where the period of sick leave following evacuation to the United States extends a week or longer; the payment of per diem continuing to such time as either the "paid sick leave" (salary) is terminated, or the individual has been returned to Burbank.

5. As a result it is necessary to look once again to the opening sentence of Section 5(b) which is set forth at paragraph 2 above:

"In the event of sickness, Employee shall be entitled to paid sick leave as determined by Employer and expressed in Employer's Industrial Relations Directives governing Salaried Employees."

Although this expression of the intention of the parties appears full and complete as to the entitlement to paid sick leave we are informed that the "company admits that no formula within the Industrial Relations Directives would provide for the great amount of sick leave involved in this case." We are further advised that the company feels that Section 16(c) takes precedence over such Directives. We agree.

6. Section 16(c) provides in part:

"Surplus or Completion. Employer may further by notice in writing or by telegram or cablegram terminate Employee's employment under this Agreement, without cause under any of the following circumstances:

"(6) If Employee, in the opinion of a medical examiner appointed by Employer, shall be determined to be sick or incapacitated to such extent that he should be removed from his place of duty.

"Upon termination by Employer under this paragraph, (c), Employer shall make available to Employee return transportation to Burbank,

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California, and Employer shall be entitled to receive his salary until he is so returned and this contract can be terminated as early as its terms permit."

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It is our determination in keeping with the explicit provisions of this section of the contract that [REDACTED] is entitled to payment of salary until he is returned from the hospital at [REDACTED] or, this overseas contract is otherwise terminated. [REDACTED] or, this entitlement to salary we would find such an entitlement synonymous with the phrase "paid sick leave" as that term is used in Section 8. [REDACTED] being entitled to "paid sick leave" during the period of hospitalization from 6 December 1957 to 11 March 1958, we would find that he is entitled to payment of per diem during that period in accordance with the provisions of Section 8 of the contract.

7. It is recognized that the result of the determinations and constructions set forth above may not be either what was intended or what was desired by either party at the time the Agreement was made. We do not feel, however, that such an argument may be given very much weight at this time. Insofar as determination of such ambiguity as might exist in the contract at the present time is necessary, then in all good conscience such ambiguity must be resolved against the employer and in favor of the employee.

8. If such results as would be found in varying fact situations under the considerations set forth above are determined not to be in keeping with Agency or IAC desires under future contracts to be entered into, we would be pleased to assist in possible amendments to be made in such contracts in order to reach such results as may be determined to be desirable.

9. It is noted for the record that the determination set forth in this paper is in fact a determination of the rights and benefits to be accorded by a contract supplier of goods and services, to his employees, under the terms of a contract of employment between the contractor and his employee. The fact that the Agency has an agreement with the supplier, which in part provides that we will pay directly certain expenses of the supplier (such as per diem to his personnel on overseas basis), does not alter the situation. In the event of an unfavorable ruling in a case such as the instant one our curiosity is whetted as to what the claimant's recourse or channel of appeal would be - The Project Director? The supplier? The Union? We do not know. Since that problem fortunately is not present in the instant case, it is not necessary of solution at the present time. We would recommend for consideration, however, that insofar as possible we avoid as studiously as possible all situations that can result in the requirement that the Agency become involved in matters that are normally for resolution between an employer and his employees.

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General Counsel

per JSW